UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

SYRINNA HALL,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Docket No. 03-299-P-C***
	)	
JO ANNE B. BARNHART,	***)***	
Commissioner of Social Security,	***)***	
	)	
Defendant	***)***	

REPORT AND RECOMMENDED DECISION[1]

This Supplemental Security Income ("SSI") appeal raises the issue whether substantial evidence supports the commissioner's determination that the plaintiff, who alleges that she is disabled as a result of carpal tunnel syndrome, fibromyalgia and depression, is capable of making a successful vocational adjustment to work existing in significant numbers in the national economy. I recommend that the decision of the commissioner be vacated and the case remanded for further proceedings.

Pursuant to the commissioner's sequential evaluation process, 20 C.F.R. § 416.920; *Goodermote v. Secretary of Health & Human Servs.*, 690 F.2d 5, 6 (1st Cir. 1982), the administrative law judge

[1] This action is properly brought under 42 U.S.C. § 1383(c)(3). The commissioner has admitted that the plaintiff has exhausted her administrative remedies. The case is presented as a request for judicial review by this court pursuant to Local Rule 16.3(a)(2)(A), which requires the plaintiff to file an itemized statement of the specific errors upon which she seeks reversal of the commissioner's decision and to complete and file a fact sheet available at the Clerk's Office. Oral argument was held before me on August 20, 2004, pursuant to Local Rule 16.3(a)(2)(C) requiring the parties to set forth at oral argument their respective positions with citations to relevant statutes, regulations, case authority and page references to the administrative record.

found, in relevant part, that the plaintiff had carpal tunnel syndrome, fibromyalgia and depression, impairments that were severe but did not meet or equal those listed in Appendix 1 to Subpart P, 20 C.F.R. § 404 (the "Listings"), Finding 2, Record at 23; that she retained the ability to perform light work but could not perform repetitive motions with her hands and was capable of performing repetitive work with simple instructions, Finding 4, *id*. at 24; and that using Rule 202.20 of Table 2, Appendix 2 to Subpart P, 20 C.F.R. § 404 (the "Grid") as a framework for decision-making and considering the testimony of a vocational expert, given the plaintiff's age ("younger individual"), education (high-school equivalent) and exertional capacity for light work, there was a significant number of jobs in the national economy she could perform, including work as a surveillance-system monitor, call-out operator or school-bus monitor, all of which jobs are at the light exertional level, do not require repetitive use of the hands and are unskilled, Findings 6-9, *id*. The Appeals Council declined to review the decision, *id*. at 6-8, making it the final determination of the commissioner, 20 C.F.R. § 416.1481; *Dupuis v. Secretary of Health & Human Servs.*, 869 F.2d 622, 623 (1st Cir. 1989).

The standard of review of the commissioner's decision is whether the determination made is supported by substantial evidence. 42 U.S.C. § 1383(c)(3); *Manso-Pizarro v. Secretary of Health & Human Servs.*, 76 F.3d 15, 16 (1st Cir. 1996). In other words, the determination must be supported by such relevant evidence as a reasonable mind might accept as adequate to support the conclusion drawn. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Rodriguez v. Secretary of Health & Human Servs*., 647 F.2d 218, 222 (1st Cir. 1981).

The administrative law judge reached Step 5 of the sequential process, at which stage the burden of proof shifts to the commissioner to show that a claimant can perform work other than his past relevant work. 20 C.F.R. § 416.920(f); *Bowen v. Yuckert*, 482 U.S. 137, 146 n.5 (1987); *Goodermote*, 690

F.2d at 7. The record must contain positive evidence in support of the commissioner's findings regarding the plaintiff's residual work capacity to perform such other work. *Rosado v. Secretary of Health & Human Servs.*, 807 F.2d 292, 294 (1st Cir. 1986).

The plaintiff assails the decision on five grounds, complaining of its: (i) reliance on irrelevant vocational testimony, (ii) citation to three jobs that cannot be performed given the limitations found, (iii) failure to use the required technique for mental impairments, (iv) failure to find a severe impairment of mental retardation or borderline intelligence and (v) inadequate consideration of the opinion of a treating physician. *See generally* Itemized Statement of Errors Pursuant to Local Rule 16.3 Submitted by Plaintiff ("Statement of Errors") (Docket No. 6). I agree that reversal and remand is warranted on the first two grounds. I briefly address the remaining three for the benefit of the parties on remand.

I. Discussion

At the plaintiff's hearing, the administrative law judge asked vocational expert Cynthia Flint-Ferguson whether there were any jobs "that a person with limited, somewhat limited manipulative functional limitations" could perform. Record at 42.[2] Flint-Ferguson responded that a person with such limitations could perform the jobs of surveillance-system monitor, call-out operator and school-bus monitor. *See id.* at 42, 44.[3]

As the plaintiff points out, *see* Statement of Errors at 2-3, the administrative law judge went on to find that she had an additional limitation not posited to Flint-Ferguson: that she could perform repetitive

[2] By this, the administrative law judge evidently meant "functional limitations with excessive, repetitive use of her hands[.]" Record at 41.

[3] In both the court's and plaintiff's counsel's copy of the Record, page 43 is missing. *See* Statement of Errors at 2 n*; Record. At oral argument, counsel for the commissioner noted that page 43 was missing from his copy as well; however, he agreed that one reasonably can infer from the testimony on page 44 that Flint-Ferguson stated that a person with the hypothetical limitations posited by the administrative law judge could perform the job of school-bus monitor in addition

(continued on next page)

work entailing simple instructions, *see* Findings 4 & 6, Record at 24. Yet he continued to rely on the same three jobs that Flint-Ferguson had cited at hearing, evidently assuming that because they were "unskilled" they required adherence only to simple instructions. *See* Finding 6, Record at 24. In so doing he erred. It is bedrock Social Security law that the responses of a vocational expert are relevant only to the extent offered in response to hypotheticals that correspond to medical evidence of record. *See, e.g., Arocho v. Secretary of Health & Human Servs.*, 670 F.2d 374, 375 (1st Cir. 1982). "To guarantee that correspondence, the Administrative Law Judge must both clarify the outputs (deciding what testimony will be credited and resolving ambiguities), and accurately transmit the clarified output to the expert in the form of assumptions." *Id*.

Nor was the error harmless. As the plaintiff again correctly points out, the demands of all three cited jobs seemingly are inconsistent with a limitation to repetitive work entailing simple instructions. *See* Statement of Errors at 3-4. The jobs of surveillance-system monitor and call-out operator both have a General Educational Development ("GED") reasoning level of 3, while that of school-bus monitor has a GED reasoning level of 2. *See* Dictionary of Occupational Titles (U.S. Dep't of Labor, 4th ed. rev. 1991) ("DOT") §§ 237.367-014 (call-out operator), 372.667-042 (school-bus monitor), 379.367-010 (surveillance-system monitor). A job with a GED reasoning level of 1 would require a worker to "[a]pply commonsense understanding to carry out simple one- or two-step instructions" and "[d]eal with standardized situations with occasional or no variables in or from these situations encountered on the job"; by contrast, a job with a GED reasoning level of 2 necessitates that a worker "[a]pply commonsense understanding to carry out detailed but uninvolved written or oral instructions" and "[d]eal with problems

to the jobs of surveillance-system monitor and call-out operator. *See* Record at 42, 44.

involving a few concrete variables in or from standardized situations," whereas a job with a GED reasoning level of 3 requires that a worker "[a]pply commonsense understanding to carry out instructions furnished in written, oral, or diagrammatic form" and "[d]eal with problems involving several concrete variables in or from standardized situations." Appendix C, § III to DOT.

As this court recently observed, whether a job is skilled or unskilled does not speak directly to the question of whether it entails simple, repetitive tasks, which seemingly is more squarely addressed by the GED ratings. *See Hall-Grover v. Barnhart*, No. 03-239-P-C, 2004 WL 1529283, at *4 (D. Me. Apr. 30, 2004) (rec. dec., *aff'd* May 24, 2004). The administrative law judge accordingly relied on an unwarranted assumption to fill the gap in vocational-expert testimony.

Remand is warranted on the ground of the administrative law judge's reliance on irrelevant vocational-expert testimony – an error that I am persuaded cannot be considered harmless. Nonetheless, for the benefit of the parties on remand, I briefly address the plaintiff's remaining three points of error:

1. Failure To Follow Required Technique for Mental Impairments. That the administrative law judge erred in failing to follow the required technique for analyzing mental impairments found at 20 C.F.R. § 416.920a. *See* Statement of Errors at 4. This point is well-taken. *See* 20 C.F.R. § 416.920a(e)(2) ("[T]he written decision issued by the administrative law judge . . . must incorporate the pertinent findings and conclusions based on the [psychiatric review] technique."). The omission should be rectified on remand.

2. Failure To Find Severe Impairment of Mental Retardation or Borderline Intelligence. That the plaintiff should have been found to have had a "severe" impairment of mental retardation or borderline intelligence, given the findings of consulting examiner Edward Quinn, Ph.D. *See* Statement of Errors at 5. I find no reversible error. Two non-examining psychiatric consultants, both of whom had the benefit of Dr. Quinn's report, discerned no severe mental-retardation or borderline-intelligence impairment. *See* Record

at 135-48 (Psychiatric Review Technique Form ("PRTF") completed on March 13, 2001 by Scott Hoch, Ph.D.), 190-203 (PRTF completed on June 25, 2001 by David R. Houston, Ph.D.).

3. Failure To Give Adequate Weight to Opinion of Treating Physician. That, while the administrative law judge mentioned an RFC assessment dated February 22, 2001 by treating physician David Kumaki, M.D., he omitted any mention of a later RFC assessment by Dr. Kumaki that noted an additional limitation (that the plaintiff would have difficulties with repetitive standing). *See* Statement of Errors at 6. This point, too, is well-taken. The administrative law judge stated: "The only specific limitations by anyone in the file is by Dr. Kumaki in February 2001 who felt she should do no heaving [sic] lifting, bending or repetitive motion. He also felt she should limit her stress (Exhibit 5F)." Record at 22. This statement was inaccurate, ignoring the later Kumaki RFC assessment that the Record indicates the administrative law judge timely received. *See id*. at 297 (Kumaki RFC assessment dated May 3, 2002 and stamped as received on May 15, 2002). While he was not obliged to credit the later RFC report, he erred in failing at least to acknowledge and discuss it. *See, e.g*., 20 C.F.R. § 416.927(d)(2) (regardless of the subject matter as to which a treating physician's opinion is offered, the commissioner must "always give good reasons in [her] notice of determination or decision for the weight we give your treating source's opinion."); Social Security Ruling 96-8p, reprinted in *West's Social Security Reporting Service* Rulings 1983-1991 (Supp. 2003) ("SSR 96-8p"), at 150 ("The RFC assessment must always consider and address medical source opinions. If the RFC assessment conflicts with an opinion from a medical source, the adjudicator must explain why the opinion was not adopted."). This error, too, should be rectified on remand.

II. Conclusion

For the foregoing reasons, I recommend that the commissioner's decision be **VACATED** and the case **REMANDED** for further proceedings not inconsistent herewith.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 25th day of August, 2004.

/s/ David M. Cohen
David M. Cohen
United States Magistrate Judge

Plaintiff

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V.

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